

NOTE: The following is a draft response to a request for an advisory opinion prepared for consideration by the Citizen's Ethics Advisory Board. It does not necessarily constitute the views of the Board.

TO: Board Members

FROM: Brian J. O'Dowd, Assistant General Counsel

RE: Caucus Attorneys' Representation of Legislators before the Office of State Ethics

DATE: March 7, 2008

INTRODUCTION

The Citizen's Ethics Advisory Board ("Board") issues this advisory opinion at the request of Morgan O'Brien,¹ legal counsel to the Senate Republicans, who inquires as to whether, and if so under what circumstances, caucus attorneys may appear before the Office of State Ethics on behalf of members of the General Assembly.

RELEVANT FACTS

The following scenario was presented by Attorney O'Brien:

Upon receipt of a notice from the [Office of State Ethics] that a complaint has been filed, the legislator/respondent will usually consult with caucus counsel. From that point, if requested by the legislator, I would consider it well within the scope of my powers and duties as counsel to contact the . . . enforcement officer handling the complaint, inform them of my representation of the legislator and begin to discuss the complaint and the events giving rise to it. The purpose of such discussion would be to resolve the matter in the most advantageous way possible for my client. If the facts and law warranted such action (i.e., a settlement could not be reached), I would want to appear before the Board to submit memoranda and argue our position and, if need be, appeal the Board's decision to the superior court.²

QUESTIONS

Attorney O'Brien asks (1) whether a caucus attorney may represent a legislator before the Office of State Ethics concerning an ethics enforcement action, and (2) whether a caucus attorney may do so concerning an informal staff letter or advisory opinion.

¹Attorney O'Brien has since retired from state service.

²Letter from Morgan O'Brien, legal counsel to the Senate Republicans, to Brian O'Dowd, assistant general counsel to the Office of State Ethics (November 5, 2007) (on file with the Office of State Ethics).

ANALYSIS

I

The first question is whether a caucus attorney may represent a legislator before the Office of State Ethics concerning an ethics enforcement action.

As “public officials,”³ legislators are subject to the Code, including § 1-84 (c),⁴ its use-of-office provision, a violation of which requires two things: (1) a use of public office and (2) personal financial gain. The latter requirement—which “contemplates that the state servant is avoiding out-of-pocket expenses”⁵—is satisfied, for if a caucus attorney represents a legislator in an ethics enforcement action, the legislator need not secure private counsel at his or her expense. As to the former requirement, the question is whether it is a “use of public office” for a legislator to use the legal services of a caucus attorney in regard to an ethics enforcement action.

Before answering that question, we address Attorney O’Brien’s suggestion that this scenario presents a “gift”—as opposed to a “use-of-office”—issue. Specifically, he asserts that a caucus attorney’s provision of legal services to a legislator with respect to an ethics enforcement action is permissible under one of the Code’s gift exceptions, General Statutes § 1-79 (e) (15), which excepts from the definition of “gift” the following: “Anything of value provided by *an employer* of . . . a public official . . . to such official . . . provided such benefits are customarily and ordinarily provided to others in similar circumstances”⁶ The legal services in question, according to Attorney O’Brien, “may fairly be characterized as provided by an employer (the state) to a public official.”⁷

Whether the state of Connecticut is an “employer” for purposes of that gift exception was addressed by the former State Ethics Commission (“former Commission”) in Advisory Opinion No. 97-25. In answering that question in the negative, the former Commission’s analysis proceeded thus: the Code contains a ban on gifts from restricted donors; the gift ban’s purpose is to reduce “outside” influences on state servants; therefore, this “gift exception . . . for gifts from an employer . . . applies only to those

³The term “public official” includes, among others, “any member or member-elect of the General Assembly” General Statutes § 1-79 (k).

⁴Section 1-84 (c) provides: “No public official or state employee shall wilfully and knowingly disclose, for financial gain, to any other person, confidential information acquired by him in the course of and by reason of his official duties or employment and no public official or state employee shall use his public office or position or any confidential information received through his holding such public office or position to obtain financial gain for himself, his spouse, child, child’s spouse, parent, brother or sister or a business with which he is associated.”

⁵Advisory Opinion No. 2000-20.

⁶(Emphasis added.)

⁷Letter from Morgan O’Brien, legal counsel to the Senate Republicans, to Brian O’Dowd, assistant general counsel to the Office of State Ethics (December 4, 2007) (on file with the Office of State Ethics).

restricted donors⁸ . . . [that] employ the public official”⁹ It went on to note that expenditures (including gift expenditures) made by a state entity for the benefit of state servants “are governed by rules established by the Department of Administrative Services and the Auditors of Public Accounts.”¹⁰ It also noted that “[i]mproper receipt of such expenditures by a state servant . . . may be deemed a use of one’s state office or position for personal financial gain, in violation of . . . § 1-84 (c).”¹¹

That brings us back to the initial question, namely, whether a legislator’s receipt of a caucus attorney’s legal services concerning an ethics enforcement action is a use of his or her state office. A January 2004 letter issued by the former Commission to then-Governor John Rowland suggests that it is.¹² There, the former Commission’s executive director and general counsel Alan Plofsky sought to “publicly reiterate and memorialize” his prior agreements with the Governor’s official and private attorneys as to the Governor’s legal representation in complaint proceedings before the former Commission.¹³ Under those agreements, Plofsky stated, “the publicly paid Governor’s counsel would strictly limit their representation to the Office of the Governor as an institution; while the Governor’s private attorney would represent him regarding actual complaint proceedings, including any required hearings.”¹⁴ He explained: “This separation of duties was based on the parties’ agreement that any further utilization of the Governor’s Counsel in Ethics Commission enforcement proceedings would be an improper use of state resources.”¹⁵

Although that appears to be the only written statement issued by the former Commission relating to the question at hand, other states’ ethics commissions have tackled similar questions and concluded likewise. For instance, the Rhode Island Ethics Commission (“Rhode Island Commission”) addressed whether it was an inappropriate use of office for a member of a state board who had been named a respondent in an ethics complaint to be represented by the board’s legal counsel before the ethics commission and on appeals of its decisions.¹⁶ According to the Rhode Island Commission, if a public official or employee takes some action that is prohibited by the ethics code, he or she is not acting in the state’s interests and is not entitled to “representation by legal counsel paid for by the public body.”¹⁷ In fact, it continued, “[t]o accept such representation at

⁸That is, registered lobbyists and any persons the official or employee knows or has reason to know are (1) doing business with or seeking to do business with his or her department or agency, (2) engaged in activities directly regulated by such department or agency, or (3) prequalified under General Statutes § 4a-100. General Statutes § 1-84 (j) and (m).

⁹Advisory Opinion No. 97-25.

¹⁰Id.

¹¹Id.

¹²Letter from Alan Plofsky, executive director and general counsel of the State Ethics Commission, to Ross Garber, legal counsel to the Office of the Governor (January 26, 2004) (on file with the Office of State Ethics).

¹³Id.

¹⁴Id.

¹⁵Id.

¹⁶Rhode Island Ethics Commission, General Commission Advisory Opinion No. 4 (November 17, 1988).

¹⁷Id.

the expense of the public body would be to use his or her public office . . . to obtain financial gain”¹⁸ It finished by noting that nothing would “prevent the public body from electing to reimburse any individual for his or her legal expenses if the Commission finds that no violation has been committed.”¹⁹

Similarly, the State Ethics Commission in Pennsylvania (“Pennsylvania Commission”) addressed whether its use-of-office provision²⁰ prohibited a township supervisor from using the township-paid solicitor to represent him with respect to its investigation as to whether he had improperly accepted gifts from contractors.²¹ From Pennsylvania state-court precedent, the Pennsylvania Commission gleaned the following: a public official found to have engaged in misconduct is not entitled to a public defense; otherwise, a public official is entitled to publicly paid legal representation as to official, rather than personal, conduct.²² The dilemma, according to the Pennsylvania Commission, is that

it would be difficult if not impossible to predict in advance whether a public official under investigation by the State Ethics Commission would ultimately be entitled to have his legal representation paid by his governmental body. Meanwhile, any use of office or the authority of office by the public official to secure or accept publicly paid legal representation to which he was not entitled would violate [the use-of-office provision].²³

Its solution was for the township supervisor to refrain from securing or even accepting township-paid representation pending the case’s outcome. And if, based on that outcome, the township supervisor was found not to have improperly accepted gifts from contractors, he could then seek to recover attorneys’ fees.²⁴

The Code takes a similar approach to that in Rhode Island and in Pennsylvania. Under General Statutes § 1-82 (c), the attorneys’ fees provision, the Code authorizes reimbursement—not prepayment—of attorneys’ fees, and then only in the event that a public official or state employee who is the subject of an ethics enforcement action is found not to have violated the Code. Specifically, § 1-82 (c) provides:

¹⁸Id.

¹⁹Id.

²⁰ Under Pennsylvania’s use-of-office provision—which is similar to Connecticut’s—“a public official/public employee is prohibited from using the authority of public office/employment or confidential information received by holding such a public position for the private pecuniary benefit of the public official/public employee himself, any member of his immediate family, or a business with which he or a member of his immediate family is associated.” Pennsylvania State Ethics Commission, Advice of Counsel (December 2, 1994).

²¹Pennsylvania State Ethics Commission, Advice of Counsel (December 2, 1994).

²²Id.

²³Id.

²⁴Id.

If a judge trial referee finds, after a hearing pursuant to this section, that there is no probable cause to believe that a public official or state employee has violated a provision of this part or section 1-101nn, or if the [Citizen's Ethics Advisory Board] determines that a public official or state employee has not violated any such provision, or if a court of competent jurisdiction overturns a finding by the board of a violation by such a respondent, the state shall pay the reasonable legal expenses of the respondent as determined by the Attorney General or by the court if appropriate. . . .²⁵

The first of two basic assumptions underlying that provision is that the subject of an ethics enforcement action would incur legal expenses—which would not be the case if a legislator was to use the legal services of a caucus attorney. The other is that, if a public official or state employee is found to have violated the Code, he or she is not entitled to a taxpayer-subsidized defense—which a legislator already would have accepted if he or she had used the legal services of a caucus attorney.

The latter assumption finds complete support in the "Report to the General Assembly by the Codes of Ethics Study Committee," which became the basis for the 1983 legislative changes to the Code, one of which was the addition of what is now § 1-82 (c), the Code's attorneys' fees provision.²⁶ In that report, the committee—which the legislature created by way of Public Acts 1982, No. 82-423—explained that a public official or state employee may be "accused of violating the Code . . . only because he holds State office or position," and that if "the accusation is unjust, and he is innocent, he should not have to bear the burden of the cost of his defense."²⁷ However, it continued, if "*a respondent is found guilty of violating the Code . . . he should pay the costs of his own defense.*"²⁸ Its rationale: although the state should pay expenses incurred by a public official or state employee in the performance of his or her duties, "[i]t is not part of his official duties to violate the Code."²⁹

Taking together those statements, the assumptions underlying § 1-82 (c), the conclusions reached by the ethics commissions in Rhode Island and Pennsylvania, and the January 2004 letter issued by the former Commission's executive director, we conclude that § 1-84 (c) prohibits a caucus attorney from representing a legislator before the Office of State Ethics concerning an ethics enforcement action. To conclude otherwise would serve only to "encourage a disregard of duty and place a premium upon

²⁵Section 1-80 (c) goes on: "If any complaint brought under the provisions of this part or section 1-101nn is made with the knowledge that it is made without foundation in fact, the respondent shall have a cause of action against the complainant for double the amount of damage caused thereby and if the respondent prevails in such action, he may be awarded by the court the costs of such action together with reasonable attorneys' fees."

²⁶See Codes of Ethics Study Committee, Report to the General Assembly by the Codes of Ethics Study Committee (January 15, 1983), p.8.

²⁷Id.

²⁸(Emphasis added.) Id.

²⁹(Emphasis added.) Id.

neglect or refusal of public officials to perform the duties imposed upon them by law.”³⁰ Certainly, no legislator should be encouraged to engage in misconduct “by the assurance that he will be able to pass defense costs on to the taxpayers . . . he was elected to serve.”³¹

That leaves us with Attorney O’Brien’s remaining arguments, which can be reduced to these: a legislator’s right to legal counsel includes the right to the most experienced and effective counsel; and the General Assembly’s provision of legal staffing (and other services) to its members is “to further the interests of the General Assembly, the four caucuses and the office of each individual legislator in effectively carrying out the public’s business.”³²

We agree that a legislator who is the subject of an ethics enforcement action is entitled to the best possible legal representation, but like any other public official or state employee, the legislator must pay for it. And if the legislator prevails at any stage of the proceedings, he or she is entitled to have “reasonable legal expenses” paid by the state in accordance with § 1-82 (c). We also agree that the provision of legal staffing to legislators serves many legitimate interests. The fact is, however, that in representing a legislator who may have violated the Code, a caucus attorney is potentially representing an interest that is diametrically opposed to the interests of the General Assembly, his or her caucus, and—most importantly—the public. The only interest served in that case would be the financial interest of the offending legislator.

II

The remaining question is whether a caucus attorney may represent a legislator before the Office of State Ethics concerning an informal staff letter or advisory opinion.

As with the previous question, the relevant provision here is § 1-84 (c), which prohibits a legislator from (1) using his or her office for (2) personal financial gain. Again, the latter requirement (i.e., personal financial gain) is satisfied, for if a caucus attorney represents a legislator in regard to an informal staff letter or advisory opinion, the legislator need not secure private counsel at his or her expense. That leaves the issue of whether it is a “use of public office” for a legislator to be represented by a caucus attorney concerning an informal staff letter or advisory opinion.

Because this question has not been addressed by way of advisory opinion, we look for guidance to a somewhat similar scenario addressed by the Massachusetts State Ethics Commission (“Massachusetts Commission”). Specifically, it addressed whether legal counsel for the chairman of a legislative committee could file a lawsuit on behalf of the committee chairman, other committee members, and their employees, “in their private capacity as residents of the Commonwealth, challenging a law which would affect them

³⁰*Wright v. Danville*, 174 Ill. 2d 391, 403, 675 N.E.2d 110 (1996).

³¹*Id.*

³²See footnote 6.

as private individuals.”³³ According to the Massachusetts Commission, the responsibilities of the attorney, a legislative employee, could reasonably include representing individuals in their capacity as legislators (for example, challenging a particular law as it affects legislators in their official capacity), but could not include filing the lawsuit in question.³⁴

What emerges from that decision is this: a legislative attorney may represent a legislator in the legislator’s official capacity, but may not do so with respect to his or her private capacity. We agree, believing it to be an inappropriate use of office for a caucus attorney to represent a legislator in his or her private—as opposed to official—capacity. For example, a legislator most certainly may not use the legal services of a caucus attorney to file the legislator’s state income taxes, to handle the closing on the legislator’s home, or to represent the legislator in connection with a probate matter.

That said, the question is whether, in representing a legislator before the Office of State Ethics concerning an informal staff letter or advisory opinion, a caucus attorney is representing the legislator in his or her private or official capacity. We believe it is the latter, for when a legislator seeks clarification of the Code in an informal staff letter or advisory opinion, he or she is doing so not as a private citizen but rather as a public official. Indeed, the only reason for making such a request is the fact that the legislator is a public official and, therefore, subject to the Code.

It may be argued that this determination is inconsistent with the conclusion reached above, in that legislators are subject to ethics enforcement actions also solely by virtue of their official positions. However, when a legislator violates the Code, he or she is not acting within the scope of his or her official capacity. As explained in the “Report to the General Assembly by the Codes of Ethics Study Committee,” it is never part of one’s “official duties to violate the Code.”³⁵ Further, although (as discussed above) there is an assumption underlying the Code that those who violate its provisions are not entitled to state-subsidized legal representation, there is no corresponding assumption with respect to informal staff letters and advisory opinions.

That being the case, we conclude that § 1-84 (c) does not prohibit a caucus attorney from representing a legislator before the Office of State Ethics concerning an informal staff letter or advisory opinion.

This conclusion appears to be consistent with the position taken by the former Commission. In December 2003, while a complaint was pending against then-Governor John Rowland, a legislator requested an advisory opinion applying one of the Code’s gift provisions to the Governor.³⁶ Subsequent to that request, Ross H. Garber, legal counsel

³³EC-COI-92-29, discussing EC-COI-83-137.

³⁴*Id.*

³⁵Codes of Ethics Study Committee, Report to the General Assembly by the Codes of Ethics Study Committee (January 15, 1983), p.8

³⁶Letter from James A. Amann, Majority Leader of the House of Representatives, to Alan Plofsky, Executive Director and General Counsel of the State Ethics Commission (December 18, 2003) (on file with the Office of State Ethics).

to the Office of the Governor, submitted a letter to the former Commission's executive director and general counsel, setting forth the respective roles of the Governor's official and private attorneys.³⁷ He stated:

With respect to the advisory opinion sought by [the legislator], I believe this involves official issues and also implicates personal interests of the Governor. In his petition, [the legislator] seeks the Commission's interpretation of the state gift laws as they apply to a Governor of Connecticut, including Governor Rowland and any future occupant of the Office of the Governor. *Accordingly, I will be representing the Office of the Governor and Governor Rowland in his official capacity in proceedings related to this request for an advisory opinion.* Nevertheless, given that any decision on the request for an advisory opinion might impact the Commission's decision on the complaint filed [against the Governor], which in turn might result in a monetary fine assessed against the Governor, the Governor's private counsel will also address the Commission.³⁸

In his response, the former Commission's executive director and general counsel noted that Attorney Garber's "description of this separation of duties" was consistent with their prior understanding.³⁹

For clarity's sake, we believe that, when a caucus attorney represents a legislator concerning an informal staff letter or advisory opinion, he or she should, as did Attorney Garber, disclose to the Office of State Ethics precisely on whose behalf and in what capacity he or she is appearing.

We finish by noting that the Code expressly authorizes any person subject to its provisions to petition the Board for an advisory opinion,⁴⁰ even if the subject of the request "is not the petitioner (e.g., when a department head requests an advisory opinion regarding an employee of the department) . . ."⁴¹ Pursuant to state regulations, the petition "shall be accompanied by a statement of any facts and arguments that support the position of the person making the inquiry."⁴² Further, the Board "may receive and consider facts, arguments and opinions from persons other than the petitioner."⁴³ Thus, for example, as the law now stands, the following holds true:

³⁷ Letter from Ross H. Garber, legal counsel to the Office of the Governor, to Alan Plofsky, executive director and general counsel of the State Ethics Commission (January 28, 2004) (on file with the Office of State Ethics).

³⁸ (Emphasis added.) Id.

³⁹ Letter from Alan Plofsky, executive director and general counsel of the State Ethics Commission, to Ross Garber, legal counsel to the Office of the Governor (January 29, 2004) (on file with the Office of State Ethics).

⁴⁰ General Statutes § 1-81 (a) (3).

⁴¹ Regs., Conn. State Agencies § 1-92-39 (a).

⁴² Regs., Conn. State Agencies § 1-92-38.

⁴³ Regs., Conn. State Agencies § 1-92-39 (a).

- If a caucus attorney is informed that a legislator is contemplating a particular outside employment opportunity, he or she may, without having been consulted by the legislator, petition the Board to address the matter and provide any arguments in support of his or her position.
- If the leadership of a caucus is informed that a legislator is contemplating a specific outside employment opportunity, it may, without having been consulted by the legislator, petition the Board to address the matter and use its caucus attorneys to provide any arguments in support of its position.
- If a legislator asks the Board whether his or her proposed outside employment is permissible under the Code, a caucus attorney may, without having been asked to do so by the legislator, submit any arguments or opinions concerning the matter.

In other words, one way or another the Code and its interpretive regulations would permit caucus attorneys to present legal arguments concerning the legislator's proposed outside employment.

CONCLUSION

It is the opinion of the Citizen's Ethics Advisory Board that § 1-84 (c) prohibits a caucus attorney from representing a legislator with respect to an ethics enforcement action, but does not prohibit a caucus attorney from representing a legislator with respect to an informal staff letter or advisory opinion.